

**Notice of Allowability**

Application No.

10/827,546

Examiner

Wendy C Haas

Applicant(s)

SAKAZAKI, USHIO

Art Unit

1661

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address--**

All claims being allowable, PROSECUTION ON THE MERITS IS (OR REMAINS) CLOSED in this application. If not included herewith (or previously mailed), a Notice of Allowance (PTOL-85) or other appropriate communication will be mailed in due course. **THIS NOTICE OF ALLOWABILITY IS NOT A GRANT OF PATENT RIGHTS.** This application is subject to withdrawal from issue at the initiative of the Office or upon petition by the applicant. See 37 CFR 1.313 and MPEP 1308.

1. ☒ This communication is responsive to 4/19/4.
2. ☒ The allowed claim(s) is/are the claim.
3. ☒ The drawings filed on 19 April 2004 are accepted by the Examiner.
4. ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
  - a) ☐ All    b) ☐ Some\*    c) ☐ None    of the:
  1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this national stage application from the International Bureau (PCT Rule 17.2(a)).

\* Certified copies not received: \_\_\_\_\_.

Applicant has THREE MONTHS FROM THE "MAILING DATE" of this communication to file a reply complying with the requirements noted below. Failure to timely comply will result in ABANDONMENT of this application.

**THIS THREE-MONTH PERIOD IS NOT EXTENDABLE.**

5. ☐ A SUBSTITUTE OATH OR DECLARATION must be submitted. Note the attached EXAMINER'S AMENDMENT or NOTICE OF INFORMAL PATENT APPLICATION (PTO-152) which gives reason(s) why the oath or declaration is deficient.
6. ☐ CORRECTED DRAWINGS ( as "replacement sheets") must be submitted.
  - (a) ☐ including changes required by the Notice of Draftsperson's Patent Drawing Review ( PTO-948) attached
    - 1) ☐ hereto or 2) ☐ to Paper No./Mail Date \_\_\_\_\_.
  - (b) ☐ including changes required by the attached Examiner's Amendment / Comment or in the Office action of Paper No./Mail Date \_\_\_\_\_.

Identifying indicia such as the application number (see 37 CFR 1.84(c)) should be written on the drawings in the front (not the back) of each sheet. Replacement sheet(s) should be labeled as such in the header according to 37 CFR 1.121(d).
7. ☐ DEPOSIT OF and/or INFORMATION about the deposit of BIOLOGICAL MATERIAL must be submitted. Note the attached Examiner's comment regarding REQUIREMENT FOR THE DEPOSIT OF BIOLOGICAL MATERIAL.

**Attachment(s)**

1. ☒ Notice of References Cited (PTO-892)
2. ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3. ☐ Information Disclosure Statements (PTO-1449 or PTO/SB/08),  
Paper No./Mail Date \_\_\_\_\_
4. ☐ Examiner's Comment Regarding Requirement for Deposit  
of Biological Material
5. ☐ Notice of Informal Patent Application (PTO-152)
6. ☒ Interview Summary (PTO-413),  
Paper No./Mail Date 9/22/4 .
7. ☒ Examiner's Amendment/Comment
8. ☒ Examiner's Statement of Reasons for Allowance
9. ☐ Other \_\_\_\_\_.

### EXAMINER'S AMENDMENT

An examiner's amendment to the record appears below. Should the changes and/or additions be unacceptable to applicant, an amendment may be filed as provided by 37 CFR 1.312. To ensure consideration of such an amendment, it MUST be submitted no later than the payment of the issue fee.

Authorization for this examiner's amendment was given in a telephone interview with Agent Catherine Anne Whealy on September 22, 2004.

The application has been amended as follows:

A. Page 1, after line 2, the following recitation has been added:

-- CROSS REFERENCE TO RELATED APPLICATIONS:

The present application is co-pending with the following related applications: Calibrachoa Plant Named 'USCALI48' (United States Plant Patent Application Number 10/827,541) and Calibrachoa Plant Named 'USCALI4' (United States Plant Patent Application Number 10/827,545). --.

B. Page 3, line 7, the recitation " , not patented" has been deleted and is replaced by:  
-- United States Plant Patent Number 10,287--.

C. Page 7, after line 13, the following recitation has been added:

-- Texture: Slightly pubescent. --.

D. Page 11, line 10, after the word "*Thielaviopsis*" the following recitation has been added: --, which causes black root rot or basal stem rot --.

***Reasons for Allowance***

Applicant's declaration filed April 19, 2004 states: "I hereby state that the new and distinct plant variety has not been publicly available nor sold anywhere in the world for more than one year prior to the filing of this U.S. Plant Patent Application." A search of the prior art has revealed no evidence that the claimed plant was either sold or publicly available more than one year prior to the filing date of the instant application. Accordingly, the publication of the CPVO breeder's rights application on February 15, 2003 (more than one year prior to the filing date of the instant application) is not an enabled disclosure under 35 U.S.C. § 102(b) for prior art purposes.

Applicant's attention is directed to the recent CAFC decision In re Elsner, 2004 WL 1811350 (Fed. Cir. 2004), which holds that publication of foreign plant breeder's rights application may be an enabling disclosure if the plant was publicly available or on sale anywhere in the world more than one year prior to applicant's filing date. Applicant is advised that a sale or public use of the claimed plant anywhere in the world more than one year prior to April 19, 2004 is material to the patentability of the claimed plant.

***Future Correspondence***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Wendy C. Haas whose telephone number is (571) 272-0976. The examiner can normally be reached on Monday through Friday 9:00 to 5:30.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Andrew Wang can be reached on (571) 272-0811. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

W. C. Haas

**KENT BELL**  
**PRIMARY EXAMINER**

*Kent A. Bell*